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IN THE
COURT OF APPEALS OF INDIANA

ARLENE NICADEMUS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0609-CR-825
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION 8
The Honorable Barbara Collins, Judge
Cause No. 49F08-0605-CM-084495

June 12, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Judge

Following a bench trial, Appellant, Arlene Nicademus, was convicted of Operating a Vehicle While Intoxicated as a Class A misdemeanor.[1] Upon appeal, Nicademus presents two issues for our review: (1) whether the trial court abused its discretion in admitting evidence concerning blood tests results, and (2) whether the evidence is sufficient to support her conviction.

We affirm.

The facts most favorable to the conviction reveal that during the evening hours of January 20, 2006, David Taylor was leaving the parking lot of Bob's Tu-Your-Door Pizza located at the corner of National and Carson Avenues in Indianapolis when his car struck Nicademus's car in the driver's side door as Nicademus was driving in one of the travel lanes. Taylor exited his car and ran to assist Nicademus, whose car had spun around and landed in a ditch. Officer Richard Faulkner of the Indianapolis Police Department ("IPD") was dispatched to the accident scene. Upon arriving, Officer Faulkner observed a car in the drainage ditch with extensive damage to the driver's side. During his investigation, Officer Faulkner questioned Nicademus, who admitted that she had been driving the heavily damaged car located in the ditch. Officer Faulkner observed that Nicademus had a strong odor of alcoholic beverages coming from her breath and that she exhibited other signs of intoxication, including an unsteady walk, slurred speech, and glassy eyes, leading Officer Faulkner to conclude that Nicademus was intoxicated.

Officer Scott Yaden, an accident investigator for IPD, arrived at the accident scene and, during the course of his investigation, spoke with Nicademus. Officer Yaden also

[1] Ind. Code § 9-30-5-2(b) (Burns Code Ed. Repl. 2004).

noticed a strong odor of an alcoholic beverage emanating from Nicademus's breath and further observed that Nicademus was very argumentative, despite the fact that he had determined that the accident was not her fault.[2]

Officer Harold Turner, who was on DUI patrol on the night of the accident, was dispatched to the scene at Officer Faulkner's request. Upon arriving, Officer Turner talked with Officers Faulkner and Yaden, who together informed him as to what happened and about their opinions of Nicademus's level of impairment. Officer Turner eventually attempted to speak with Nicademus, but she "wouldn't say one word to [him]." Transcript at 30. Officer Turner noticed an odor of alcoholic beverage coming from Nicademus and further observed that Nicademus's eyes were glassy and bloodshot and that she was staggering as she walked. When asked to submit to field sobriety tests or to testing with a portable instrument, Nicademus just shook her head from left to right, indicating her refusal to comply. Officer Turner also formed an opinion that Nicademus was intoxicated. Believing he had probable cause that Nicademus operated a vehicle while intoxicated, Officer Turner read Indiana's implied consent law to Nicademus. Nicademus did not respond, so Officer Turner read the implied consent law a second time, and again, Nicademus said nothing, thus indicating a desire not to cooperate. Officer Turner then placed Nicademus under arrest.

Officer Turner filled out an affidavit for probable cause, and based thereon, a judge issued a search warrant to obtain and remove a blood sample from Nicademus. After Officer Turner read the warrant to Nicademus, Nicademus stated, "I don't care if

[2] The evidence is silent as to whether Officer Yaden communicated his conclusion to Nicademus.

you have a search warrant or not you're not going to get my blood." Transcript at 37. Officer Turner then transported Nicademus to Wishard Hospital Holding Detention Facility for the Marion County Sheriff's Department, where Officer Turner observed Lloyd Bridges use a "Betadine prep" and draw a blood sample from Nicademus, without further objection from Nicademus. Mr. Bridges handed the vials of Nicademus's blood directly to Officer Turner, who completed filling out the label thereon with the case number, his initials, and the date and time, before putting the vials in his pocket. Officer Turner took the vials to the property room and filled out a request for the crime laboratory to do an ethanol test on the blood sample. The test results showed that Nicademus's blood-alcohol concentration was 0.088 grams per one hundred milliliters of blood, which is .008 grams over the legal limit.

On May 12, 2006, the State re-filed[3] an information charging Nicademus with two counts of operating while intoxicated, one as a Class A misdemeanor[4] and one as a Class C misdemeanor.[5] On June 9, 2006, Nicademus filed a motion to dismiss the Class C misdemeanor, arguing that by adding such charge the State was attempting to improperly amend the previously dismissed charging information. The trial court granted Nicademus's motion to dismiss the Class C misdemeanor charge.

[3] The State had previously filed a Class A misdemeanor charge of operating while intoxicated and a charge of public intoxication against Nicademus under a different cause number. Those charges were dismissed upon the State's request on February 23, 2006.

[4] I.C. § 9-30-5-2(b).

[5] Ind. Code § 9-30-5-1(a) (Burns Code Ed. Repl. 2004).

A bench trial was held on August 15, 2006 with regard to the remaining Class A misdemeanor charge of operating while intoxicated in a manner that endangers a person. At the conclusion of the evidence, the trial court found Nicademus guilty as charged. The trial court sentenced Nicademus to 365 days in the county jail, with 364 days suspended.

Nicademus first challenges the trial court's admission of the results of the blood test. The admission of evidence is within the sound discretion of the trial court. Holden v. State, 815 N.E.2d 1049, 1053 (Ind. Ct. App. 2004), trans. denied. We will reverse the trial court only for an abuse of discretion. Id. An abuse of discretion occurs when the trial court's evidentiary ruling is clearly against the logic, facts, and circumstances presented. Id. at 1053-54.

The first prong of Nicademus's challenge to the admission of the blood test results is that the search warrant authorizing the blood draw was invalid, as it was based upon a probable cause affidavit which in turn was based upon hearsay with regard to how the attesting officer knew that Nicademus was the driver of one of the vehicles involved in the accident.[6] Nicademus further notes that there was no evidence within the affidavit to establish the reliability of the hearsay.[7] We need not address this argument, however,

[6] Specifically, in the probable cause affidavit, Officer Turner stated, "I believe the above-named individual was the operator of the motor vehicle in question because: she was identified as subject driving vehicle involved in an accident." State's Exhibit 1. The text found before the colon is pre-printed on the probable cause affidavit form. The text following the colon was presumably handwritten by Officer Turner.

[7] Indiana Code § 35-33-5-2 (Burns Code Ed. Supp. 2006) sets forth the requirements for an affidavit submitted in support of an arrest or search warrant. If based upon hearsay, the affidavit must

because we find Nicademus's second challenge to the admission of the blood test results to be dispositive.

The second prong of Nicademus's challenge is that the State failed to lay a proper foundation for admission of the blood test results. Specifically, Nicademus argues that the State failed to present an adequate foundation to establish that the person who drew Nicademus's blood was trained in obtaining bodily substance samples and was acting under a protocol prepared by a physician as is required by Indiana Code § 9-30-6-6 (Burns Code Ed. Supp. 2006). That statute provides, in pertinent part, as follows:

> "(a) A physician or a person trained in obtaining bodily substance samples and acting under the direction of or under a protocol prepared by a physician, who:
>
> (1) obtains a blood, urine, or other bodily substance sample from a person, regardless of whether the sample is taken for diagnostic purposes or at the request of a law enforcement officer under this section; or
>
> (2) performs a chemical test on blood, urine, or other bodily substance obtained from a person;
>
> shall deliver the sample or disclose the results of the test to a law enforcement officer who requests the sample or results as a part of a criminal investigation. Samples and test results shall be provided to a law enforcement officer even if the person has not consented to or otherwise authorized their release."

The final witness called by the State was a forensic scientist through whom the State sought to introduce the blood test results. Nicademus timely objected to the admission of such evidence upon grounds that the State failed to lay an appropriate foundation. In response to Nicademus's objection, the State referred to the testimony of

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contain either reliable information establishing the credibility of the source of the hearsay and a factual basis for the information or information which establishes that the totality of circumstances corroborates the hearsay. I.C. § 35-33-5-2(b).

Officer Turner, who had testified that an individual named "Lloyd Bridges" collected the blood sample and that Bridges used a "Betadine prep." To supplement the foundation for the admission of the blood test results, the State was permitted to re-call Officer Turner, who further explained that he had observed one to two hundred other blood draws and that each time the procedure was the same as was followed in the present case. Based upon Officer Turner's testimony, the trial court apparently concluded that the State had laid an adequate foundation to satisfy the requirements of I.C. § 9-30-6-6 and therefore overruled Nicademus's objection to the admission of the blood test results.

Having reviewed I.C. § 9-30-6-6 and the record before this court, we agree with Nicademus that the State failed to lay an adequate foundation for the admission of the blood test results. First, with regard to whether the blood was drawn by a physician or a person trained in obtaining bodily substance samples, the only evidence is that Officer Turner could identify the individual who conducted the blood draw by name. Officer Turner could not identify Bridges's title or position, nor did Officer Turner know whether Bridges was a person trained in obtaining bodily substances. There was no other evidence before the court from which it could be determined whether Bridges was a physician or a person trained in obtaining bodily substance samples as is required by I.C. § 9-30-6-6.

Further, with regard to whether Bridges was acting under the direction of or under a protocol prepared by a physician, the only evidence is that Bridges used a Betadine prep and that, according to Officer Turner, the procedure used was the same as he had witnessed one to two hundred other times.

We note that in Shepherd v. State, 690 N.E.2d 318, 328 (Ind. Ct. App. 1997), trans. denied, called into question on other grounds, this court considered the issue of whether there was sufficient evidence establishing that "the protocol used for collecting Shepherd's blood after the accident was prepared by a physician as required by I.C. § 9-30-6-6." (Emphasis supplied). In that case, the technician who collected the blood sample testified that the protocol used was prepared by the technical staff and subsequently reviewed and approved by a physician. Additionally, the court noted that the protocol contained the signature of a physician certifying that the protocol was the accepted policy and procedures for the hospital. The court concluded that this evidence was sufficient to indicate that the protocol was prepared by a physician as required by the statute. Id. at 328-29.

Here, unlike Shepherd, there is absolutely no evidence as to whether Bridges was acting under the direction of or under a protocol prepared by a physician. Given that the State presented little, if any, probative evidence to establish a foundation for the admission of the blood test results as is required by I.C. § 9-30-6-6, we conclude that the trial court abused its discretion in admitting the blood test results into evidence.

Having concluded that the blood test results were inadmissible, we next consider whether the remaining evidence is insufficient to sustain Nicademus's conviction for operating while intoxicated as a Class A misdemeanor. When reviewing a challenge to the sufficiency of the evidence, this court will neither reweigh evidence nor judge witness credibility, but instead, considering only the evidence which supports the conviction along with the reasonable inferences to be drawn therefrom, we determine whether there

is substantial evidence of probative value from which a reasonable trier of fact could have concluded that the defendant was guilty of the charged crime beyond a reasonable doubt. Kien v. State, 782 N.E.2d 398, 407 (Ind. Ct. App. 2003), trans. denied. Convictions for operating while intoxicated may be supported by circumstantial evidence. Ashba v. State, 816 N.E.2d 862, 867 (Ind. Ct. App. 2004) (citing Kremer v. State, 643 N.E.2d 357, 360 (Ind. Ct. App. 1994)). When a conviction is based upon circumstantial evidence, this court will not disturb the judgment if the fact-finder could reasonably infer from the evidence presented that the defendant is guilty beyond a reasonable doubt. Brown v. State, 827 N.E.2d 149, 152 (Ind. Ct. App. 2005). Additionally, the circumstantial evidence need not overcome every reasonable hypothesis of innocence; the evidence is sufficient if an inference may reasonably be drawn from it to support the judgment. Id.

The offense of operating a vehicle while intoxicated is a Class C misdemeanor. I.C. § 9-30-5-2(a). The offense is elevated to a Class A misdemeanor if the defendant operated a vehicle while intoxicated in a manner which endangered a person. I.C. § 9-30-5-2(b). Here, the State charged Nicademus with the A misdemeanor offense. Thus, to convict Nicademus of operating while intoxicated as a Class A misdemeanor, the State had to demonstrate that (1) Nicademus (2) operated a vehicle (3) while intoxicated (4) in a manner which endangered a person.

During the bench trial, the State presented evidence that after the accident, Nicademus's eyes were glassy and bloodshot, she was staggering as she walked, there was an odor of alcoholic beverage emanating from her person, and she was argumentative and uncooperative. Notwithstanding the inadmissibility of the blood test

results,[8] the numerous indications of impairment are sufficient from which the trial court could have reasonably concluded that Nicademus was intoxicated. See Luckhart v. State, 780 N.E.2d 1165, 1167 (Ind. Ct. App. 2003) (finding sufficient evidence of intoxication where officers observed that defendant smelled of alcohol, had bloodshot eyes and slurred speech, and was having difficulty balancing himself), disapproved of on other grounds by Ham v. State, 826 N.E.2d 640 (Ind. 2005); Pickens v. State, 751 N.E.2d 331, 335 (Ind. Ct. App. 2001).

Nicademus also specifically challenges the sufficiency of the State's evidence with regard to whether she operated her vehicle "in a manner that endangered a person." Endangerment may be proved by evidence that the defendant's condition or manner of operating the vehicle could have endangered any person, including the public, the police, or the defendant herself. Ashba, 816 N.E.2d at 866-67.

As noted above, the State presented evidence from three police officers each of whom formed the opinion upon observing and interacting with Nicademus following the accident that Nicademus was intoxicated. The officers observed that Nicademus had bloodshot and glassy eyes, that the smell of alcohol emanated from her person, that she was unsteady on her feet, and that she was argumentative and uncooperative. A reasonable inference can be drawn from this evidence that Nicademus was so impaired and that her dexterity was so compromised that she could not safely operate a vehicle. Her level of impairment, as observed by the three police officers, is sufficient to support

[8] Given the manner in which Nicademus was charged, there is no statutory requirement of proof of a particular blood alcohol content. As noted, the State was required to prove only that Nicademus operated a vehicle while intoxicated in a manner that endangered a person. See I.C. § 9-30-5-2(b).

the trier of fact's determination that Nicademus operated a vehicle in a manner which endangered a person. Indeed, her level of impairment and the fact that she was behind the wheel of a car presented a danger not only to the public at large, but to Nicademus herself. We therefore conclude that the evidence is sufficient to sustain Nicademus's conviction for operating a vehicle while intoxicated as a Class A misdemeanor.

The judgment of the trial court is affirmed.

SHARPNACK, J., and CRONE, J., concur.